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No. 817

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

VITO GENOVESE, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Pursuant to Rule 58 this Petition for Rehearing seeks rehearing of the May 16, 1960, denial of certiorari.

A number of recent developments provide important additional reasons why certiorari should be granted, and also fortify the reasons previously presented. These recent developments are, in the main:

1. A recently published opinion by Judge Wyzanski, setting forth applicable criteria with respect to prejudicial publicity in federal criminal trials.

2. This Court's grant of certiorari on May 31, 1960, in Nos. 45, 479, and 872, *Travis* v. *United States*, which likewise involves a corroboration question, and its pertinency to the importance of reviewing the corroboration question in Genovese's case as well.

3. An enlarged group of recent Jencks Act decisions by the Courts of Appeals in other circuits, which make unequivocally clear how seriously the Court of Appeals in the present case departed from proper standards and failed to fulfill its appellate responsibilities under the Jencks Act.

The new developments emphasize the compelling reasons for this Court to review this case, where the trial court has imposed on Genovese what may be virtually a life sentence.

I

The first question presented (Petition, pages 2, 30-34, and Petitioner's Reply, pages 1-4) was whether Genovese's right to a fair trial was violated by the barrage of severely prejudicial publicity which occurred before and during the trial; and whether any of the numerous requests for relief on that account should have been granted. The Petition argued the importance of this question not only to assure a just disposition of this case but also to obtain a clearer definition of the standards applicable in the federal courts; in addition, it urged the importance of the Court's considering the question together with *Irvin* v. *Dowd*, No. 722 (which will be argued next term) in order to assist in further developing and expressing the criteria respectively

applicable in federal and in State criminal cases which involve important and recurring problems of this kind.

A recently published opinion by Judge Wyzanski in *Geagan* v. *Gavin*, 181 F. Supp. 466 (D. Mass. 1960) underscores the recurring nature of the problem and the justification for this Court's reviewing the present case. Judge Wyzanski had before him a habeas corpus proceeding, collaterally attacking the Massachusetts State court convictions in the so-called "Brinks robbery"; and after examining the facts he concluded that the defendants' rights under the Due Process Clause had not been infringed by the alleged adverse publicity. In setting forth the standards which are applicable to federal trials, however, Judge Wyzanski stated (181 F. Supp. at 473):

> "Thus the worst that might be provable by petitioners against the prosecutors is that they participated in releasing for conspicuous and continuous publication evidence which they did introduce against the petitioners, and other evidence which they did not introduce and could not introduce over objection at the trial. Included in this latter category were the criminal records of the petitioners.
>
> "There are grave risks inherent in pre-trial publication of detailed evidence (which may or may not be offered in court) of the commission of a crime, of defendant's alleged participation, of defendant's prior criminal record, and of other material which tends to lead persons to form at least a tentative judgment before they hear in court the evidence and the governing law. Such pre-trial publicity makes it more difficult to be sure that defendant has the benefit of the presumption of innocence and the guarantee of confrontation of the

witnesses against him. In some countries such publicity is punished criminally as a contempt of court. In this country if such publicity is stimulated by public authorities, a federal court, in the exercise of its general power to supervise the administration of criminal justice in its own judicial system, may postpone a trial, or even set aside a judgment of conviction if a defendant's motion for continuance is denied and despite that motion a trial is held forthwith before the effects of pretrial publicity have abated. Delaney v. United States, 1 Cir., 199 F. 2d 107."

Application of these governing principles would lead to setting aside Genovese's conviction in the present case.

II

There were previously set forth (Petition, pages 3, 34-39, and Petitioner's Reply, pages 4-8) the strong reasons for this Court to examine, in this case, the question whether a federal conviction can be based solely on accomplice testimony, in the total absence of corroboration connecting or tending to connect the defendant with the offense.[1] As to this question the reasons advanced for granting certiorari included, among others, the fact that in recent years this Court has

[1] In urging that a corroboration rule should be enforced in the federal courts, it was shown also that a requirement of such corroboration is firmly established in the law of many States. A very recent illustration of the application of this requirement will be found in the Court of Appeals for the Ninth Circuit's decision in *Ing* v. *United States*, No. 16199, decided May 12, 1960 (not yet reported), which arose under Alaska's territorial legislation. The Ninth Circuit reversed the conviction because the proof did not meet Alaska's requirement that accomplice testimony be corroborated by evidence connecting or tending to connect the accused with offense.

given renewed and enlarged recognition to a requirement of corroboration in various other situations (perjury prosecutions; extrajudicial admissions of a defendant; admissions of elements of offense which involves no tangible corpus delicti). It was urged that the need to have a comparable requirement, in order to offset the danger of grave injustice, appears to be at least equally compelling in situations like the present case where the supposed proof consists of accomplice testimony which wholly lacks corroboration connecting the defendant with the offense.

On May 31, 1960, this Court granted certiorari in Nos. 75, 479 and 872, *Travis* v. *United States*. The *Travis* case presents for decision the question whether the corroboration requirement applies to prosecutions for filing false affidavits under Section 9(h) of the National Labor Relations Act, 29 U.S.C. § 159(h), as it does in perjury prosecutions. Accordingly, it now appears that this Court will have before it next term an extensive review on the merits of the scope of the doctrine of corroboration in federal criminal trials.

This strongly reinforces the grounds previously urged for reviewing the corroboration question presented by the present record. As the Petition demonstrated, conviction of Genovese rests solely on the word of Cantellops, who was named as a co-conspirator in the indictment; since there is not a syllable of corroborative proof in any way tending to connect Genovese with the alleged narcotics conspiracy, the record thus squarely presents the corroboration question. Many of the considerations relevant to whether it is in the interests of justice to enforce the corroboration requirement will be the same, or similar, in *Travis* and in this case. The corroboration issues in *Travis* and in this case are

sufficiently closely related so that the Court's examination of both cases at the same time should enable each of the cases to shed light upon the other, thus contributing to orderly development of the administration of federal criminal justice.

In any event—even if the Court should not decide to grant certiorari here in advance of its decision on the merits in *Travis*—it is suggested that an appropriate procedure would then be to withhold action on this case pending the *Travis* argument and decision.[2] A reversal in *Travis* on the corroboration issue might well be based on reasoning which would have forceful and direct application here.

III

The "Jencks" questions (Petition, pages 3, 39-41; Petitioner's Reply, pages 8-13) are likewise illuminated by recent developments.

The issues, it will be recalled, are whether under the *Jencks* decision and the Jencks Act the trial judge, on the basis of his *in camera* examinations, improperly withheld statements and reports from defense counsel; and in any event, whether the Court of Appeals failed to give—and to show that it had given—any appellate review to that matter. In this connection it was urged, among other things, that in *Palermo* v. *United States*, 360 U.S. 343, 355, this Court had made clear the duty of appellate courts under the Jencks Act to examine the sealed exhibits transmitted on appeal, in order to determine whether the trial court was correct or incorrect in

[2] On February 10, 1960, Mr. Justice Harlan denied Genovese's application for bail, with leave to renew if certiorari is granted. On February 11, 1960, Genovese surrendered to custody and is now imprisoned at Atlanta Penitentiary.

withholding particular items from the defense. It was likewise shown that, in the present case, although the sealed exhibits had been transmitted by the District Court to the Court of Appeals in connection with the appeal,[3] nevertheless there was nothing in the opinion of the Court of Appeals to indicate that the Court of Appeals had reviewed the trial judge's determinations on these matters, and indeed nothing to indicate that the Court of Appeals had even examined the sealed exhibits.

Nearly a full year has now elapsed since this Court decided *Palermo*. During the interval numerous Jencks Act decisions have been handed down by the various Courts of Appeals. The opinions in these have been examined. Apart from the present case, not a single case has been found where, despite the fact that the sealed exhibits were transmitted to the Court of Appeals, the Court of Appeals failed to examine the sealed exhibits and to state that it had done so. Indeed, the Courts of Appeals have been most meticulous in stating expressly that they have made such an examination, thus discharging the express duty of appellate review placed on them by the Jencks Act, 18 U.S.C. § 3500(*c*), and at the same time preserving both fairness and the equally essential appearance of fairness.

Thus in *Travis* v. *United States*, 269 F. 2d 928, 944 (1959)—in which, as already indicated (page 5, supra), certiorari has just been granted—the Tenth Circuit stated: "We have carefully examined and compared the complete documents and the documents as they were submitted finally to the defense and con-

[3] In connection with the Petition, the sealed exhibits were thereafter transmitted by the Court of Appeals to the Clerk of this Court (see Petition, page 29, note 10).

clude that the only excised portions related to matters and persons not connected with the present case." In *West* v. *United States*, 274 F. 2d 885, 889-890 (1960), petition for certiorari pending sub nomine *Haug* v. *United States*, No. 946, the Sixth Circuit stated: "we have examined the reports and excisions to determine the correctness of the rulings of the Court under Title 18 U.S.C.A. § 3500, subsection (c)", and "We have examined the reports and the portions excised by the trial judge, and find his rulings correct and in accordance with Title 18 U.S.C.A. § 3500, subsection (c)". In *United States* v. *Killian*, 275 F. 2d 561, 570 (1960), the Seventh Circuit stated: "We have reviewed the original statements produced by the government for inspection by the court and as delivered to defendant after excision by the court". And compare the District of Columbia Circuit's decision in *Howard* v. *United States*, No. 15449, decided May 5, 1940, (not yet reported).

Thus the decisions in various other circuits all reinforce a conclusion inevitable both under the statute and under elementary requirements of fair play. They make it unequivocally clear that Section 3500(c) imposes a firm duty on the Court of Appeals to examine the withheld exhibits (or withheld portions of exhibits) which have been sealed and transmitted for appellate review, in order to determine as an appellate matter the correctness or incorrectness of the various determinations made by the trial judge on the basis of his *in camera* examination. Far from cutting off appellate review, the statute expressly imposes such a duty; and in other circuits the Courts of Appeals have been meticulous in adhering to it.

As has been shown, this case as to Genovese turned completely on the testimony of a single controverted

witness (Cantellops), whose credibility was the principal issue at the trial and whose story demonstrably had changed greatly from time to time. Fundamental fairness, the statute itself, and the uniform decisions of other appellate courts—these all make it necessary that there be some appellate review in some appellate court of the question whether or not certain documents and portions of documents withheld from the defense by the trial judge contained statements by Cantellops which the Jencks Act required to be produced.

Moreover, reports relating to various other Government witnesses were also withheld from the defense—including three portions of a case report by Bureau of Narcotics Agent Schrier, a witness for the prosecution (Petition, page 26, note 8, and Petitioner's Reply, pages 11-12). Recent decisions of various circuits are unanimous in holding that under the Jencks Act a Government agent is like any other witness; that when he testifies, his pertinent prior statements, including his case report, must be turned over to the defense for examination.[4]

Since the prosecution's witnesses, including Agent Schrier, were all subject to the Jencks Act, it was the plain duty of the Court of Appeals to undertake an

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[4] *United States* v. *Berry*, No. 12822, 7th Cir., decided May 2, 1960 (not yet reported); *United States* v. *Sheer*, Nos. 12826-12828, 7th Cir., decided May 10, 1960 (not yet reported); *Karp* v. *United States*, No. 16375, 8th Cir., decided April 25, 1960 (not yet reported); *Howard* v. *United States*, No. 15449, D.C. Cir., decided May 5, 1960 (not yet reported); *Holmes* v. *United States*, 271 F. 2d 635 (4th Cir. 1959); *United States* v. *Prince*, 264 F. 2d 850 (3rd Cir. 1959). Judicial enforcement of this obligation to furnish the statements of Government agents who have testified as witnesses is likewise one of the issues involved in *Travis* v. *United States*, No. 479, already referred to, where certiorari was granted on May 31, 1960.

appellate review of the sealed exhibits and to determine whether the trial judge's rulings, based on his *in camera* examination, were correct or incorrect. This the Court of Appeals has totally failed to do.

There are many situations in the law where particularized determinations are required from the courts, and where the failure of the court below to make a necessary determination is the ground for reversing or vacating its judgment with a direction that the determination be made.[5] Express determinations are normally indispensable in criminal cases, where liberty is at stake—and especially with respect to those actions of the court which are based on *in camera* examinations of documents not available to the defendant.

Only the other day this Court reaffirmed the basic importance of "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice' ". *Levine* v. *United States*, No. 164, decided May 23, 1960. No man should be sent to the penitentiary for what may be virtually a life sentence, when there does not appear to have been any appellate review whatsoever of whether the trial judge's determinations under the Jencks Act were correct or incorrect. If it is felt that this Court should not, in the first instance, make such a determination for itself on the basis of its own examination of the sealed exhibits, then at the very least the matter should be remanded to the Court of Appeals for an initial appellate determination there.

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[5] E.g., *Specack* v. *Strauss*, 355 U.S. 601; *Jones* v. *United States*, 362 U.S. 257, 272-273; *Federal Communications Commission* v. *Station WJR*, 337 U.S. 265; *Blackburn* v. *Alabama*, 354 U.S. 393; *Nilva* v. *United States*, 352 U.S. 385, 396; *Williams* v. *Georgia*, 349 U.S. 375; *Jaffke* v. *Dunham*, 352 U.S. 280; *Goett* v. *Union Carbide Corp.*, 361 U.S. 340.

IV

With respect to the new evidence in this case (Petition, pages 47-50 and Appendix D; Petitioner's Reply, pages 14-18), the Solicitor General's position has been that this matter in the first instance should be raised by petitioner in the District Court. If certiorari is not granted at this time, then it is contemplated that appropriate measures will be taken by petitioner in the District Court for this purpose.

Accordingly, if the Court does not decide at this time that certiorari should be granted, the Court may consider it appropriate to defer its action in the entire case until the impact of the new evidence has been heard and determined below.[6]

CONCLUSION

Recent developments confirm the widespread importance of the questions presented by petitioner and strongly reinforce the reasons why those questions should be reviewed by this Court.

For the reasons set forth in this Petition for Rehearing—as well as for all the reasons previously urged—rehearing and certiorari should be granted.

If the Court does not decide at this time that certiorari should be granted, then in the alternative it is

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[6] The Court followed a somewhat comparable procedure in the *Travis* case, already referred to. There this Court withheld action on the petitions in both No. 75 and No. 479, until No. 879 (which involved the second motion for new trial based on newly discovered evidence) was acted on by the District Court and the Court of Appeals and then became ripe for consideration by this Court upon the filing of a petition for certiorari, at which time the three petitions were considered by this Court together and certiorari was granted on all three.

suggested that the Court hold the case, pending the argument and decision of *Travis* v. *United States* (for reasons indicated at pages 5-6, supra), or pending further proceedings in this case in the District Court based on the newly discovered evidence (for reasons indicated at page 11, supra).

Respectfully submitted,

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June 9, 1960

CERTIFICATE

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in paragraph 2 of Rule 58 of the Rules of this Court.

BENNETT BOSKEY